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No. 467

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

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ARROW CARRIER CORPORATION, *Appellant*

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION, *Appellees*

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**On Appeal from the United States District Court for the District of New Jersey**

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## JURISDICTIONAL STATEMENT

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**On Appeal from the United States District Court for the District of New Jersey**

## JURISDICTIONAL STATEMENT

### OPINIONS BELOW

The Opinion of the United States District Court for the District of New Jersey was filed June 14, 1963 and is attached hereto as Appendix A. The findings of fact and conclusions of law entered by the said Court was filed June 14, 1963 and is attached hereto as Appendix B. The Order entered by the said Court was also filed June 14, 1963 and is attached hereto as Appendix C. The "Report of the Commission on Reconsideration" issued by the Interstate Commerce Commission under service date of March 27, 1962 is printed at 88 M.C.C. 745, and is attached hereto as Appendix D.

## JURISDICTION

The action before the United States District Court was brought pursuant to Title 28, United States Code, Sections 1336, 1398, 2284, 2321, 2322 and 2325, to vacate, set aside and annul an Order of the Interstate Commerce Commission. The Opinion and Order of the three judge District Court was entered on June 14, 1963 and Notice of Appeal was filed in that Court by Arrow Carrier Corporation, Appellant, on July 15, 1963.

The jurisdiction of the Supreme Court to review this Opinion and Order by direct Appeal is conferred by Title 28 U.S.C., Sections 1253 and 2101(b) and is sustained by the following decisions: *United States, et al,* v. *Henry E. Drum, et al,* 368 U.S. 370 (1962); *Frozen Food Express* v. *United States,* 351 U.S. 40 (1956); *American Trucking Assoc.* v. *Frisco Transp. Co.,* 358 U.S. 133 (1958); *Minneapolis and St. L. R. Co.* v. *United States,* 361 U.S. 173 (1959); *Florida Lime and Avocado Growers* v. *Jacobson,* 362 U.S. 73 (1960); and *American Trucking Assoc. Inc., et al,* v. *United States, et al,* 364 U.S. 1 (1960).

## STATUTES INVOLVED

The provisions of the Interstate Commerce Act pertinent to this proceeding are as follows:

### DEFINITIONS

Section 203(a)(10) of Part II of the Interstate Commerce Act (49 U. S. C. 303(a)(10))

> "The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce

moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water".

Section 203(c) of Part II of the Interstate Commerce Act (49 U. S. C. 303(c))

"Except as provided in section 302(c) of this title, subsection (b) of this section, in the exception in subsection (a) (14) of this section, and in the second proviso in section 306(a) (1) of this title, no person shall enage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person".

POWERS AND DUTIES.

Section 204(c) of Part II of the Interstate Commerce Act (49 U. S. C. 304(c))

"Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provi-

sion or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint".

CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

Section 206(a)(1) of Part II of the Interstate Commerce Act (49 U. S. C. 306(a)(1))

"Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and

within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307 (a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful".

## QUESTIONS PRESENTED

The following questions are presented for determination:

1. Did the District Court err in finding a subterfuge on the part of Plaintiff, in view of its operations pursuant to valid interstate Certificates, which, on their face, authorize the challenged transportation?

2. Was there direct evidence of bad faith to support the finding of subterfuge on the part of Plaintiff made by the District Court?

3. Did the District Court erroneously place the burden of proof upon Arrow Carrier Corporation rather than upon Pennsylvania Public Utility Commission?

4. Is the challenged transportation "between places in the same State through another State" interstate commerce, in accordance with the statutory definition contained in Section 203(a)(10) of Part II of the Interstate Commerce Act (Title 49 U. S. C., Section 303(a)(10))?

## STATEMENT OF THE CASE

This cause arose upon Complaint and Petition. Arrow Carrier Corporation (Arrow) filed a Petition with the Interstate Commerce Commission for a Declaratory Order that Arrow, under its interstate authority is authorized to conduct operations between Pennsylvania origins and Pennsylvania destinations over its certificated interstate routes traversing the State of New Jersey. Pennsylvania Public Utility Commission (Pennsylvania Commission) filed a Complaint with the Interstate Commerce Commission naming Arrow as Defendant and averring that operations by Arrow in transporting property from Pennsylvania origins to Pennsylvania destinations over routes lying partly in New Jersey were beyond the scope of its interstate authority and constituted a subterfuge.

The proceedings were heard on a consolidated record, together with a similar Petition filed by Hudson Transportation Company and a similar Complaint by the Pennsylvania Commission directed against Hudson Transportation Company.

The facts as presented at the hearing were as follows:

The Pennsylvania Commission presented its investigators who testified that they followed certain vehicles owned or operated by Arrow, but did not relate that testimony to any of the specific movements mentioned in the Complaint. The distance and driving times over the challenged route and over routes lying wholly within Pennsylvania were presented.

Arrow, in its presentation, established the existence of its Certificates; pointed out the portions relied upon to support its contention that the grants of authority

were properly tacked or combined; identified its terminals; indicated that all traffic transported was moved pursuant to published interstate routes and published interstate rates; and explained its mode of operation.

The traffic in question moved from Philadelphia, Pa. via road vehicle over U. S. Highway 1 to Trenton, N. J., over New Jersey Highway 69 to Clinton, N. J., over U. S. Highway 22 to Phillipsburg, N. J. and Allentown, Pa. and over the same route in the reverse direction. Regular round trip road runs are operated between Philadelphia, Pa. and Carlstadt, N. J.; between Carlstadt, N. J. and Scranton, Pa., via Phillipsburg, N. J.; and between Carlstadt, N. J. and Hazleton, Williamsport, Shamokin and Schuylkill Haven, Pa., all via Phillipsburg, N. J. and Allentown, Pa. All road runs originating at Carlstadt, except the Carlstadt-Philadelphia run, pass through Allentown, Pa. or Phillipsburg, N. J. and all of these runs stop at either the Phillipsburg, N. J. or Allentown, Pa. terminals for changes in routing instructions or to pickup freight, with the further exception of full truck loads destined to Scranton, Pa.

After the aforementioned road runs from Philadelphia, Pa. to Allentown, Pa. reach Allentown, the freight is unloaded and transferred to the appropriate road run from Carlstadt, N. J. destined to the terminal serving the destination point of the shipment, such as Hazleton, Williamsport, Shamokin or Schuylkill Haven, Pa. Pick up and delivery runs operate radially out of each of these Pennsylvania terminals and out of the Phillipsburg, N. J. terminal. It is on these pick up trucks that freight is gathered from shippers or delivered to the ultimate consignee.

The freight delivered at the Philadelphia, Pa. terminal by the road run from Allentown, Pa. is similarly delivered by local delivery trucks which also pick up freight.

Solicitors are maintained at all terminals and the solicitors seek freight for the Hudson Valley of New York, for southern New Jersey, for New York City, for export and for interline traffic with other carriers to New England and to the southern states, as well as to and from points in Pennsylvania.

A representative of Arrow Carrier Corporation testified that absent any regulation, his company would utilize routes lying wholly in Pennsylvania. However, all of the challenged transportation from Pennsylvania origins to Pennsylvania destinations moved over the above-specified certificated interstate routes of Arrow, via New Jersey.

The Hearing Examiner recommended denial of the Petition for Declaratory Order, found that Arrow's operations under its interstate Certificates constituted a subterfuge and recommended the issuance of a Cease and Desist Order. After Exceptions, Division 1 of the Interstate Commerce Commission denied the Petition for Declaratory Order, sustained the Examiner's finding of subterfuge but indicated that there was no violation of the Interstate Commerce Act and dismissed the Complaint.

Subsequently, the proceedings were re-opened and the Interstate Commerce Commission issued its Report denying Arrow's Petition for Declaratory Order, sustaining the Complaint and issuing a Cease and Desist Order. The three judge District Court affirmed the Interstate Commerce Commission.

## THE QUESTIONS ARE SUBSTANTIAL

### (a) The Conclusion of Subterfuge Is Unwarranted

The District Court in concluding that the operations of Arrow Carrier Corporation constituted a subterfuge predicated its decision upon the following factors: that the combination of Certificates constituted artificially contrived arrangements (App. 11a) resulting in a "mystic maze" (App. 11a-12a); that the route employed and the driving time were almost double a direct intrastate operation (App. 8a); that absent regulation, direct Pennsylvania intrastate routes would be employed; and that the routes were not logical and normal operations (App. 11a). The Court did not point in its Opinion to any direct evidence of bad faith, such as fraud in the procurement or operation of the Certificates, deceit or concealment.

These bases upon which the ultimate conclusion rests are not supported either by the facts or by the law.

At no point in the proceedings before the Interstate Commerce Commission or before the District Court was there any challenge raised as to the validity of the Certificates of Arrow Carrier Corporation. Specifically, the Interstate Commerce Commission did not find that the combination of the authorities violated any established principles with respect to the tacking or combination thereof. How then could there be a "mystic maze" in the combination?

Neither the Court nor the Interstate Commerce Commission explained the manner in which the combination of authorities violated any of the principles applicable to tacking or combination of authorities, statutory or otherwise. How then could the combination constitute an artificial and contrived arrangement?

Since there are no legal principles violated and since there has been no mention made of any section of the *Interstate Commerce* Act which Arrow Carrier Corporation is alleged to have violated, the action in combining the authorities becomes a proper and legal one in the absence of direct evidence of bad faith, such as fraud, deceit or concealment.

We thus have a situation in which valid subsisting Certificates are properly tacked and combined, but accompanied by a conclusion of subterfuge in the resultant transportation, despite the absence of affirmative evidence of bad faith, such as concealment, fraud or deceit.

To the extent that the District Court considered the question of circuity of route and driving time as indicative of subterfuge, the law does not sustain such a conclusion. Your Honorable Court in *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, 359 U.S. 171, indicated that subterfuge may not be predicated upon these factors, even when the routes are twice as long as the shortest possible distance, unless there is present direct evidence of bad faith:

> "It contends that petitioner's circuitous and unnecessarily long routes were a mere subterfuge to escape intrastate regulation and evade its jurisdiction. Aside from the testimony of highway officers as to the actual shipments, none of which is disputed, the Commonwealth's evidence consisted solely of maps substantiating its position that petitioner's routes were circuitous and often long, sometimes exceeding twice the shortest possible route. *However, it offered no direct evidence of bad faith on the part of petitioner* in moving *its traffic through Bluefield, West Virginia*" (Emphasis supplied).

The District Court also predicated its conclusion of subterfuge upon testimony to the effect that absent regulation, Arrow Carrier Corporation would operate over routes lying wholly within Pennsylvania (App. 8a). This, however, constitutes an hypothesis contrary to fact, in that there is regulation. To this extent as well, the reasoning is unsound.

When the District Court predicated its conclusion, in part, upon the fact that the routes in question had not been shown to be logical and normal operations, it reversed the burden of proof and imposed it upon Arrow Carrier Corporation, contrary to *Western Union Telegraph Co.* v. *Speight*, 254 U.S. 17. In that case, a suit was brought in the State Court against the telegraph company to recover for mental suffering caused by an error in delivering a telegraphic message. The message was from Greenville, North Carolina to Rosemary, North Carolina and was transmitted via Roanoke and Norfolk, Virginia. The jury found that the message was sent out of North Carolina into Virginia for the purpose of fraudulently evading liability under the laws of North Carolina. Nevertheless, the presiding judge set aside the verdict as a matter of law ordered a non-suit. On Appeal, the North Carolina Supreme Court directed that judgment be entered on the verdict.

In reversing, your Honorable Court stated that even if motives were material: "The burden was on the plaintiff to make out her case. Moreover the motive would not have made the business intrastate." (At Page 19)

The District Court has erroneously relied upon *Eichholz* v. *Public Service Commission of Missouri*, 306 U.S. 268, to support its conclusion of subterfuge. In that

proceeding, Eichholz, prior to 1935, received a Permit from the Missouri Public Service Commission to operate as a motor carrier of property in interstate commerce. Part II of the Interstate Commerce Act regulating motor carriers was passed in 1935 and previous thereto the Federal Government had not subjected interstate motor carriers to regulation. Accordingly, such operations properly could be regulated by the several states.

After passage of Part II of the Interstate Commerce Act, Eichholz applied for a Grandfather Permit, pursuant to Section 209(a)(1) of said Act. It was during the pendency of that application that the Missouri Commission had determined certain of Eichholz's operations to be intrastate in nature. Upon such determination, the Missouri Interstate Permit of Eichholz was withdrawn. On Appeal the action of the Missouri Commission was sustained by your Honorable Court. In the course of the Opinion, at Page 273, your Honorable Court stated:

> "When the Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded".

Your Honorable Court subsequently construed the *Eichholz case* in *Service Storage and Transfer Co.* v. *Commonwealth of Virginia*, 359 U.S. 171, *supra*, as follows:

> "Nor is *Eichholz* v. *Public Service Comm'n*, 306 U.S. 268 (1939) to the contrary. There Missouri

> revoked a carrier's interstate permit because it crossed state lines into Kansas City, Kansas, for the sole purpose of *creating* an interstate operation. Eichholz, however, had no certificate from the Interstate Commerce Commission, and *this court's opinion was premised on this fact rather than that the interstate operations were merely a subterfuge and hence not bona fide*" (Emphasis supplied).

It is evident that the *Eichholz case* did not turn upon the question of subterfuge, but rather upon the question of concurrent jurisdiction. The reliance by the District Court upon the *Eichholz case* to sustain its conclusion of subterfuge constituted error.

The conclusion of subterfuge in the instant matter cannot be reconciled with prior decisions of the Interstate Commerce Commission, wherein specific authority has been granted to a carrier to perform an interstate service between points in a single state through another state. In *H. C. Gabler, Inc., Extension—Cement from Maryland and Pennsylvania Counties*, MC. 27817, Sub. 35; 86 M.C.C. 447, some of the applicants involved received authority from cement producing origins in a specific state to destinations in the same state. By way of explanation, the Interstate Commerce Commission stated:

> "Authority to serve destination points in the same State as the origin is located is granted uniformly where sought, for the evidence establishes that such authority is generally required to enable applicants to utilize more feasible and economical interstate routes and to accord shippers greater flexibility in diverting shipments already en route" (86 M.C.C. 447, 484).

The dissent to the Order of the Interstate Commerce Commission also recognizes that the Commission by

granting such certificates was encouraging the very type of operation which the majority of the Commission condemned (Commissioner Herring's dissent; Appendix D, p. 31a).

The conclusion of subterfuge is not warranted for other reasons. The law presumes in favor of the integrity of conduct on the part of one accused. Generally speaking, in the absence of any proof to the contrary, there is a presumption that all men act fairly, honestly, and in good faith. 20 *American Jurisprudence* 229, citing *T. W. Jenkins and Co.* v. *Anaheim Sugar Co.*, C.C.A., 9th Circuit, 247 Fed. 958; *Weininger* v. *Metropolitan Fire Insurance Co.*, 359 Ill. 584, 195 NE 420; *Boone* v. *Kerr-Magee Oil Industries*, C.C.A., 10th Circuit, 217 Fed. 63; *Kalpakis* v. *Kalpakis*, 221 La. 739, 60 So. 2d 217.

The Circuit Court of Appeals of the 9th Circuit in a cause involving purchase of corporate stock had before it a case where subterfuge was expressly alleged, as in the present case, but also like the present case, there was no affirmative evidence thereof. The Circuit Court of Appeals in reversing the lower court said:

> "There is nothing in the pleadings and certainly nothing in the evidence to support the contention that Appellant tried to keep anything from the knowledge of the Appellee or tried to get him to sign the letter by unfair means." *Los Angeles Fisheries* v. *Crook*, 47 F. 2d 1031, 1035.

In *Western Union Telegraph Company* v. *Speight*, 254 U.S. 17, *supra*, your Honorable Court indicated that motive, even if material, could not have transformed any interstate commerce into intrastate com-

merce. Further, it was declared: "The transmission of a message through two states is interstate commerce as a matter of fact. *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U.S. 617".

For all of these reasons, the conclusion of subterfuge in the instant matter was unwarranted and contrary to law.

**(b) The District Court's Decision Is Contrary to an Act of Congress and to Prior Decisions Establishing Commerce "Between Places in the Same State Through Another State" as Interstate Commerce**

The definition of interstate commerce as commerce "between places in the same state through another state" was established by the Congress in Section 203 (a)(10) of Part II of the Interstate Commerce Act (Title 49 U.S.C., Section 303(a)(10)) and has been interpreted time after time by the Interstate Commerce Commission and by your Honorable Court.

One case having particular applicability here is the *Atlantic Freight Lines, Inc.* proceeding. In that case, Pennsylvania Public Utility Commission instituted a Complaint before itself against the carrier, averring that transportation between two Pennsylvania points, via an interstate certificated route traversing another state, constituted intrastate commerce and, hence, was illegal. The case was appealed to the Superior Court of Pennsylvania, which sustained the Pennsylvania Commission. *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utility Commission*, 163 Pa. Superior Ct. 215, 6 A. 2d 589. Thereafter, the Supreme Court of Pennsylvania refused allocatur and your Honorable Court denied certiorari. Atlantic Freight Lines, Inc. then filed a Petition for Declaratory Order (similar to the one filed by Arrow Carrier Corporation in this

proceeding), docketed by said Commission at MC-77477, 51 M.C.C. 175. The Interstate Commerce Commission took jurisdiction and found for Atlantic Freight Lines, Inc.

In so doing, the Interstate Commerce Commission pointed out that the Certificates of Atlantic Freight Lines, Inc. contained the following language preceding the outline of the authority granted:

> "IT IS FURTHER ORDERED: that the transportation service to be performed by said carrier in interstate or foreign commerce shall be as specified below:"

The identical language is to be found in the Arrow Carrier Certificates. In the *Atlantic Freight Lines, Inc. Petition for Declaratory Order* case, *supra*, the Interstate Commerce Commission indicated that such language:

> ". . . serves as a factual finding that the operations authorized in the certificates are in interstate or foreign commerce and within our jurisdiction and that we have assumed jurisdiction over, and propose to regulate, them in accordance with and in furtherance of the purposes of the Interstate Commerce Act" (51 M.C.C. 175, 187).

In the *Atlantic Freight Lines* case the interstate route was longer than the most direct route between the Pennsylvania points involved (51 M.C.C. 175, 179), as is true in the instant case. In the *Atlantic Freight Lines* case, the driving time was greater over the interstate route (51 M.C.C. 175, 179), a factor also involved here. There, as here, the carrier charged the appropriate interstate rate (51 M.C.C. 175, 179; N.T. 201-202). In both cases, the carrier involved sought a

declaratory order. In the *Atlantic Freight Lines* case, supra, the Declaratory Order was granted. In the instant case, it was not.

The *Atlantic Freight Lines* litigation did not terminate at this point. After the issuance of the Interstate Commerce Commission's Order in favor of *Atlantic Freight Lines* in the Declaratory Order proceedings, *supra*, Pennsylvania Public Utility Commission instituted an equity action against *Atlantic Freight Lines, Inc.* in the Court of Common Pleas of Dauphin County, Pennsylvania, docketed at Equity Docket Number 20008, Commonwealth Docket Number 267. In this proceeding, Pennsylvania Public Utility Commission entered into a Consent Decree, whereunder *Atlantic Freight Lines, Inc.* was permitted to operate between two Pennsylvania points via interstate routes of movement!

The Interstate Commerce Commission recognized this same doctrine in *Dixie Freight Lines, Inc., Common Carrier Application*, 24 M.C.C. 780, wherein a question arose as to whether transportation from Atlanta, Georgia to Fort Benning, Georgia via Opelika, Alabama constituted interstate commerce. In deciding that it did, the Commission stated:

> ". . . there can be no question but that property transported from Atlanta to Fort Benning via Opelika moves in interstate commerce. This is seen from the definition of that term in Section 203(a)(10) of the Motor Carrier Act of 1935, which reads as follows:" (Act cited) (24 M.C.C. 780, 782).

Complainant also has recognized the validity of the congessional definition. In *Rule Issued Against Trans-Bridge Lines, Inc.*, A. 74567, Folder 3, Am-A; 39 Pa.

P.U.C. 111, the Pennsylvania Commission issued a Rule to Show Cause why the Certificates of Trans-Bridge Lines, Inc. should not be cancelled or other penalties invoked because that carrier had transported a group of persons from East Stroudsburg, Pennsylvania to Erie, Pennsylvania to the American Legion Convention. In the course of its decision, the Pennsylvania Commission stated:

> "A further inquiry into the facts, made after our aforesaid order, discloses that the movement was from East Stroudsburg to Syracuse and Lake Chatauqua, New York, and thence to Erie, Pennsylvania. The movement into New York State was made at the written request of the Legion members under date of March 16, 1961, wherein the membership desired a sight-seeing tour in New York State en route to Erie, Pennsylvania. The respondent complied with the request made by the Legion.
>
> It would appear from the aforementioned new information before us that *the movement was interstate although the ultimate destination point was Erie, Pennsylvania*" (Page 112) (Emphasis supplied).

Your Honorable Court likewise has construed transportation between places in the same state via another state to be interstate commerce. In *Roundtree* v. *Terrell*, 22 F. Supp. 297 (1938, Roundtree operated trucks from Dallas, Texas to Texarkana, Arkansas, where his terminals are located and arranged for the ultimate distribution of traffic from that point to Texarkana, Texas. In holding that this operation was interstate commerce, it was stated:

> "The freight passed from Texas into Arkansas. When it does that, it is interstate commerce" (At Page 299).

In *Central Greyhound Lines* v. *Mealey*, 334 U.S. 563 (1948), the question was raised as to whether a New York State tax applied with respect to operations beginning at a point in New York and ending at a point in the same state, over routes traversing Pennsylvania. There it was stated that:

> "It is too late in the day to deny that transportation which leaves the state and enters another state is commerce among the several states simply because the points from and to are in the same state" (334 U.S. 655-656).

In *Western Union Telegraph Co.* v. *Speight*, 254 U.S. 17, *supra*, your Honorable Court held that the transmission of a message between places in the same state through another state was interstate commerce as a matter of fact and added that even motive would not have made the business intrastate in character.

The Order appealed from has swept away and nullified all of these decisions, resulting in confusion in the transportation industry.

**(c) A Decision in This Proceeding Will Clarify the Law and Tend to Eliminate Further Confusion and Litigation on the Subject of Interstate Commerce**

It may be argued that the questions herein presented are foreclosed by prior decisions of your Honorable Court and that clarification of the law is not desirable. The confusion which has arisen in connection with *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, 359 U.S. 171 is apparent from the Opinion of the District Court. We contend that the *Service Storage case*, *supra*, indicated that mere circuity of route absent direct evidence of bad faith could not establish subterfuge. We further contend that the *Service Storage case*, *supra*, made it clear that

*Eichholz* v. *Public Service Commission of Missouri*, 306 U.S. 268, *supra*, was decided on the basis of concurrent jurisdiction and not subterfuge.

It originally appeared that the *Service Storage case*, *supra*, and *Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 361 U.S. 11 and 361 U.S. 904, had settled the controversy surrounding the interpretation of Section 203(a)(10). However, the Order of the District Court appears to be in conflict and further appears to cast doubt upon these decisions and other decisions of your Honorable Court, including *Central Greyhound Lines* v. *Mealey*, *supra*, *Roundtree* v. *Terrell*, *supra*, and *Western Union Telegraph Co.* v. *Speight*, *supra*.

Rather than foreclosing a determination of the questions herein presented, the prior decisions of your Honorable Court warrant a decision in this proceeding in order to clarify the law which has been clouded by the Order appealed from.

A clarification of the questions here involved also would tend to eliminate further litigation before the Interstate Commerce Commission and the lower courts. On this basis, probable jurisdiction is indicated.

In *Alcoa S. S. Co.* v. *U. S.*, 338 U.S. 421, 423; 70 S. Ct. 190; 94 L. Ed. 225, this Court stated:

> "We granted certiorari because determination of the issue raised here will guide adjustment of a large body of similar claims now pending".

In similar circumstances, certiorari was granted in *Ludecke* v. *Watkins*, 335 U.S. 160, 162; 68 S. Ct. 1429; 92 L. Ed. 1881, where it was stated by the Court:

> "We are advised that there are 530 alien enemies ordered to depart from the United States, whose

disposition awaits the outcome of this case". (Footnote 2, Page 162).

Appellants urge that your Honorable Court by fully disposing of the questions here presented will effectively lessen further litigation before the Interstate Commerce Commission and the Federal Courts relative to an interpretation of Section 203(a)(10), as to what constitutes interstate commerce.

## CONCLUSION

The questions presented by this Appeal are substantial and require plenary consideration, with briefs and oral argument for their resolution.

Probable jurisdiction should be noted.

Respectfully submitted,

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August 29, 1963

**APPENDIX A**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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Civil Action No. 362-62

HUDSON TRANSPORTATION COMPANY, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
*Intervening Defendant*.

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Civil Action No. 306-62

ARROW CARRIER CORPORATION, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
*Intervening Defendant*.

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**Opinion**

Before: McLAUGHLIN, Circuit Judge, and WORTENDYKE and LANE, District Judges.

By McLAUGHLIN, Circuit Judge.

These are separate suits by unrelated parties brought under 28 U.S.C. § 1336 to set aside orders of the Interstate Commerce Commission. Because they involved similar issues the proceedings before the Interstate Commerce Commission were heard on a consolidated record, with the Examiner filing a single report and recommended order regarding them. They were considered by Division One of the Interstate Commerce Commission which filed a con-

solidated report thereon. Thereafter the Commission reviewed the proceedings and disposed of them in one report and order. The cases were consolidated for hearing in this court and heard March 8, 1963.

The causes came to the Interstate Commerce Commission (I.C.C.) first, through the filing of petitions by both present plaintiffs asking for declaratory orders that they are authorized by the I.C.C., inter alia, to conduct operations between Pennsylvania origin points and Pennsylvania destination points over their certificated interstate routes traversing New Jersey and second, through complaints filed by the Pennsylvania Public Utility Commission (P.U.C.) charging that the plaintiffs are motor carriers holding certain authorities issued by the I.C.C. and subject to the provisions of the I.C.C. Act; that they have transported property by motor vehicle between certain points in Pennsylvania over routes through points in New Jersey, without first having obtained appropriate certificates of public convenience and necessity from the I.C.C. as required by Sections 203(c) and 206(a)(1) of the I.C.C. Act or having obtained a certificate from P.U.C. as required by Sections 202(b) and 202(c) of the Public Utility Law of Pennsylvania.

Following the hearing before the Examiner the latter filed his recommended report and order. In that he found that the challenged operations of the present plaintiffs between points in Pennsylvania through points in New Jersey, in the transportation of property both originating and terminating at points within Pennsylvania were not authorized by their certificates, that they were engaged in that traffic without proper authority and in violation of the I.C.C. Act, § 206(a)(1) and that an order should be entered requiring each defendant to cease and desist from all such operations. It was also recommended that present plaintiffs' petition above mentioned be denied.

Division One after reconsideration of the issues concluded that the disputed operations of Hudson and Arrow were, but for their routing, actually intrastate commerce and holding that the carriers' petition to the extent they sought an interpretation to the contrary, should be denied. There was the further holding that said operations were authorized by the carriers' certificates and that the complaints in so far as they embraced those activities be dismissed. The Division went on to say:

> "No logical reason appears for the present routing of the intrastate freight other than the fact that defendants are without intrastate authority to transport it; and from the record, it fairly appears that the only reason for such routing is so that Hudson and Arrow may participate in intrastate traffic purportedly under rights arising from certificates issued by this Commission. All things considered, we are convinced that both Hudson and Arrow have, in their respective operations hereinabove described, by which they have transported freight moving between Pennsylvania points without a prior or subsequent interstate movement, attempted in bad faith to convert, to interstate traffic, traffic which, but for routing, is actually in intrastate commerce subject to the laws of Pennsylvania.
>
> "We do not believe, however, than an order directed against such intrastate transportation would be appropriate in these proceedings, inasmuch as we have no jurisdiction over intrastate commerce and the physical operations involved, as actually conducted, violate no provision of the Interstate Commerce Act."

Though the Division concluded, as stated in the paragraph just above, that an order directed against the particular type of transportation would not be appropriate in the proceedings and so to that extent should be dismissed, it did specifically find that:

> "(2) that the challenged operations by defendants between the points in Pennsylvania involved, through

points in New Jersey, in the transportation of property both originating and terminating at points within Pennsylvania are, but for their routing, in intrastate commerce inasmuch as they are conducted as a subterfuge to evade the laws of Pennsylvania; * * *."

On reconsideration, the Commission stated in its report:

"We are convinced that in the absence of regulation by the Commonwealth of Pennsylvania both defendants would use the normal and direct routes between the Pennsylvania points they hold themselves out to serve. We are satisfied, as were division 1 and the examiner, that in the transportation of freight moving between Pennsylvania points without a prior or subsequent interstate movement, the defendants have attempted in bad faith to convert what is essentially intrastate commerce into interstate commerce and thus to defeat the regulatory laws and policies of the Commonwealth of Pennsylvania. In other words, this is a case of subterfuge, pure and simple."

and held:

"On reconsideration in Nos. MC-C-2671 and MC-C-2696, we find (1) that the described operations by defendants between points in Pennsylvania through points in New Jersey in the transportation of property originating or terminating at points without Pennsylvania are authorized by the respective defendants' certificates; and (2) that the described operations by defendants between the involved points in Pennsylvania, through points in New Jersey, which transportation of property originates and terminates within Pennsylvania, are, but for their routing, in intrastate commerce inasmuch as they are conducted as a subterfuge to evade the laws of Pennsylvania and they are not authorized by their respective certificates; and (3) that an order should be entered requiring each defendant to cease and desist, and hereafter abstain from holding themselves out or performing, under certificates issued by this Commission, all operations herein found to be, in effect, intrastate in character.

"In Nos. MC-113933, Mc-71536, and MC-71536, subnumbers 1, 2 and 3, we find on reconsideration that

the matters to which the petitions are directed have been disposed of in the findings above and the petitions thus should be denied.

"An appropriate order will be entered."

The facts are uncomplicated and quite similar in both cases.

Hudson has an I.C.C. certificate which allows it to operate between Philadelphia and Warren County, New Jersey. It has another certificate which permits it to operate between that New Jersey area and Easton, Allentown, Scranton, and the Stroudsburg area. By tacking the two together it has been operating a freight route between Philadelphia and Easton, Allentown, Scranton and other Pennsylvania points in that latter section. Hudson does not have Pennsylvania Public Utility Commission authority for a freight route between Philadelphia and the stated Pennsylvania territory. It is argued most capably on behalf of Hudson that since it has the lawful I.C.C. certificates and since the practice of tacking is permitted, that it should be allowed to continue to so function.

Substantial evidence was presented at the hearing from which either by admission, directly or by proper inference, it could have been justifiably concluded that Hudson's routes between Philadelphia and Easton, Allentown, Scranton and other related Pennsylvania destinations were circuitous, that no stops were made between those points to pick up or deliver freight, that the mileage and time so consumed were both far greater than the distance and time to make such run by directly proceeding between Philadelphia and those places. There is some attempt at fringe contradiction of this but our own examination of the record satisfies us that at best this is quibbling; it actually ignores the supporting testimony and stresses that which is more favorable to Hudson. The Hudson Vice President in charge of traffic and sales was a witness. On

direct examination he testified that his company's route above mentioned between Philadelphia and Scranton was the most direct route. He said the route was through New Jersey. He said that using "these routes" is not subterfuge "because this is the only way Hudson Transportation can travel, via these routes because of our interstate authority, in MC113993". With reference to those routes he said: "We generally operate around the clock, 24 hours a day, seven days a week." He admitted his company advertised in the Philadelphia Telephone Directory. "Direct service to points in Pennsylvania;" that it advertises in the Allentown, Scranton and Wilkes-Barre telephone directories "service in Pennsylvania," that it uses four full time solicitors for business who carry with them a point list of the points Hudson can serve or that it alleges it can service in Pennsylvania.

The witness was asked by the Examiner:

> "If there was no regulation from the I.C.C. or Pennsylvania Public Utility Commission, what route would you take from Philadelphia to Scranton, *the shortest route, a practical route*?"

The witness answered:

> "*In all probability I would take the turnpike*" which he said was in Pennsylvania. (Emphasis supplied).

With respect to the route Hudson takes between Philadelphia and Scranton, the witness was asked:

> "Because you have the authority to go as you allege by way of New Jersey, that is the reason you take it that way?"
>
> The answer was "Yes."
>
> Asked, "So the only difference between what becomes interstate and intrastate is your determination to take it by way of New Jersey?" The witness answered, "It is not my determination. It is the only way we can get to Philadelphia via the gateway of Warren County."

The witness agreed with the testimony of Hudson's Executive Vice President before the Pennsylvania Public Utilities Commission that there were no stops in all Hudson's transportation between Allentown and Scranton and Philadelphia, including no stops made in New Jersey, also that there were no drop-offs in New Jersey, en route, or any pickups en route, in any of the instances involved in the complaints and that the transportation was performed at night, which the witness stated was the normal trucking company time for operation between terminals.

The evidence in the Arrow record is along the same lines. And in this instance also, the carrier position is presented with the utmost of lawyerlike skill. Some objection is raised in Arrow's complaint re dissimilarity of issues with the Hudson matter but before the Examiner when the cases were consolidated, Arrow agreed that "The issues are the same, and therefore I see no reason for a continuance, or for a separation of the issues." The record shows plainly that evidence common to both suits was available for use in the two suits.

Here again we have important testimony from a company executive, this time from the President of Arrow. He stated that all Arrow Philadelphia traffic, destined for Allentown and related Pennsylvania areas, proceeded in a course from Philadelphia to Trenton, New Jersey, Clinton, New Jersey, Phillipsburg, New Jersey, back across the Delaware River and on the Pennsylvania side to Allentown. There are an average of three to four loads a night over these routes in each direction. Covering the same ground he said, "Between Philadelphia and Pennsylvania points, we move three or four loads a night northbound and I would say two or three a night southbound. So you would have an average of six to seven loads a night, I would say, out of a total on your entire system, let us say of around 90 loads." The business has increased to those figures from a trailer load a day between Philadelphia